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FREE SPEECH IS NOT A PIECE OF CAKE

Dr David Capper, Queen's University Belfast¹

Introduction

One of the most difficult challenges faced by Human Rights' Law is the balancing of conflicting rights. The recognition that a person or a group of persons have certain rights that must be respected by others not infrequently imposes obligations on those others that may infringe their own rights. Courts have to balance conflicting rights in these scenarios and potentially grant an accommodation to one party that may diminish the rights to be enjoyed by the other. One of those 'conflict zones' that legal systems are now having to grapple with concerns the right of persons whose sexual orientation is different from opposite sex attraction that, rightly or wrongly, has traditionally been perceived as normal, not to be discriminated against in the provision of goods and services, employment opportunities, etc. There is the potential here for conflict with the rights of evangelical Christians, many of whom adhere to the belief that sexual activity taking place outside of marriage between one man and one woman, is sinful. In England and Wales a practising Christian employed by a local government council as a registrar of births, deaths and marriages, was held to have been properly disciplined by her employer because of her refusal to officiate at civil partnership ceremonies.² A Christian relationship counsellor was held to have been fairly dismissed when he refused to provide psychosexual therapy to same-sex couples.³ The European Court of Human Rights found no infringement of the applicants' rights under Article 9 of the European Convention of Human Rights in either case.⁴ This particular 'conflict zone' can also present free speech issues to the extent that the duty of the Christian service provider not to discriminate against another on the ground of their sexuality, may place limitations on the Christian's right to express their disagreement with sexual practices and relationships they regard as sinful. There may even be a 'coerced speech' issue if the right not to be discriminated against requires Christian service providers to associate themselves with views contrary to their own deeply held beliefs.

On any occasion when the European Court of Human Rights has to determine whether an applicant's right to freedom of expression under Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms has been infringed, the judgment of the Court is likely to contain words similar to the following:-

¹ I am grateful for Professor Christopher McCrudden's comments on a previous draft of this paper, and to participants at the Free Speech Symposium at Pazmany Peter Catholic University Budapest on 6 June 2017.

² *Islington LBC v Ladele* [2010] EWCA Civ 1357, [2010] 1 WLR 955.

³ *McFarlane v Relate Avon Ltd* [2010] ICR 507 (EAT).

⁴ *Eweida v United Kingdom* (2013) 57 EHRR 8. In one other of these four conjoined appeals, the *Eweida* case itself, a breach of Article 9 was found. Ms Eweida wanted to wear a cross at work but her case did not involve any conflict with the rights of others not to be discriminated against.

“Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly. Moreover, Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.”⁵

Article 10 of the Convention is worded as follows:-

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Article 10 and the jurisprudence of the Strasbourg institutions interpreting it, is full of high rhetoric about the value of views outwardly *expressed*. Less clear is the extent to which Article 10 may contain within it a fundamental freedom to decline to express or be associated with views with which one disagrees. This was one of the issues presented by the ‘Ashers Bakery’ or ‘Gay Cake’ case which was decided by the Northern Ireland Court of Appeal in October 2016.⁶

Ashers – Facts and Case History

In May 2014 Gareth Lee, a gay man associated with an organisation called QueerSpace, a volunteer-led organisation for the LGBT community in Northern Ireland, placed an order for a cake at the city centre shop of Ashers Bakery in Belfast. Ashers Bakery is a limited company run by the McArthur family, practising Christians and members of the Presbyterian Church in Ireland. Asher was one of the 12 sons of the Jewish Patriarch Jacob and his name was given

⁵ *Palomo Sanchez and Others v Spain* App 28995/06 (12 September 2011, Grand Chamber) (citations omitted), para 53. See also *Otto-Preminger Institute v Austria* App 13470/87 (1995) 19 EHRR 34, para 50; *Wingrove v United Kingdom* App 17419/90 (1997) 24 EHRR 1, para 52; *Murphy v Ireland* App 44179/98 (2004) 38 EHRR 13, para 65; *Giniewski v France* App 64016/00 (2007) 45 EHRR 23, para 43; *IA v Turkey* App 42571/98 (2007) 45 EHRR 30, para 23.

⁶ *Lee v McArthur* [2016] NICA 39, [2016] HRLR 22.

to one of the 12 tribes of Israel. The name Ashers is an allusion to Genesis chapter 49, verse 20, where the dying Patriarch states: "Out of Asher his bread shall be fat, and he shall yield royal dainties."⁷

Mr Lee requested that the cake be decorated with a colour picture of 'Bert and Ernie' (the logo for QueerSpace) and the headline caption "Support Gay Marriage".⁸ Mrs Karen McArthur, the second appellant in the case, accepted Mr Lee's order, but after talking the matter over with her family, subsequently decided to cancel it. She telephoned Mr Lee and explained to him that Ashers was a Christian bakery and that the McArthur family believed that gay marriage was sinful. Accordingly they felt that they would be acting contrary to God's law were they to fulfil Mr Lee's order. Mr Lee received a refund of his money and was able to obtain a similar cake from another outlet in sufficient time to mark the 'Northern Ireland Anti-homophobic Week' for which it had been requested.

The view of the McArthur family that marriage is the union of one man and one woman is a mainstream view among Christians. It is not a universally accepted view and is not a fundamental of the faith like the Resurrection of Jesus Christ. Anyone who does not believe in the latter would not be regarded as a Christian by any other Christian. Some Christians do believe that a man may marry another man and a woman may marry another woman. On 25 May 2017 the General Assembly of the Presbyterian Church in Scotland officially accepted a Theological Forum Report calling for the approval of same-sex marriage and apologising to homosexuals for past mistreatment. Currently the Marriage (Same Sex Couples) Act 2013 allows churches in Great Britain to decline to celebrate gay marriages in church, and requires the Church of England to do so.⁹ The attitude of the Presbyterian Church in Ireland is very different from its Scottish counterpart. It does not now send representatives to the General Assembly of the Church in Scotland because of the Scottish Church's position on gay marriage. Recently David Ford, an Alliance Party member of the Northern Ireland Assembly and former Minister of Justice in Northern Ireland, was 'stood down' from his position as an elder of his Presbyterian Church in County Antrim because he voted for the 'Gay Marriage Bill' in the Assembly. On 5th May 2017 the Church of Ireland¹⁰ General Synod rejected (by a 176 to 146 majority) a motion calling for more public and prayerful understanding of those in same sex relationships because it was considered incompatible with the Church's teaching that marriage is between one man and one woman. The faith based objection of the McArthur family to decorating a cake with the words "Support Gay Marriage" is thus their own personal view, albeit one that would certainly be shared by a many other Christians.

⁷ *Authorised (King James) Version*. Modern English translations (Good News Bible, New International Version, and the English Standard Version) use the word 'food' rather than 'bread'.

⁸ Gay marriage is permitted by law in Great Britain under the Marriage (Same Sex Couples) Act 2013. A bill to allow for gay marriage in Northern Ireland received a narrow vote in favour in the Northern Ireland Assembly but was blocked by the Democratic Unionist Party invoking the Petition of Concern procedure under section 42 of the Northern Ireland Act 1998. If 30 members of the Assembly sign a Petition of Concern against a bill it must receive at least a 60% majority of members voting, together with at least 40% of designated Unionist and Nationalist members voting.

⁹ For discussion of issues raised by gay marriage in the Church of England see Javier Garcia Oliva and Helen Hall, 'Same-Sex Marriage: An Inevitable Challenge to Religious Liberty and Establishment?' (2014) 3 *Ox. J Law Religion* 25.

¹⁰ This is the Anglican Church in Ireland.

With the financial support of the Equality Commission for Northern Ireland Mr Lee instituted civil proceedings in the county court in Belfast, claiming that the refusal to supply him with the cake containing the decorations requested unlawfully discriminated against him on the grounds of his sexual orientation and his political opinion. A little more than a year after the events described above the Presiding District Judge, Judge Brownlie, upheld Mr Lee's claim on both grounds and awarded the sum of £500 damages for injury to feelings. With the financial support of the Christian Institute, which had funded their defence in the county court, the McArthur family appealed this decision to the Northern Ireland Court of Appeal under the case stated procedure of article 61 of the County Court (NI) Order 1980.

Discrimination Against the Respondent

The focus of this paper is on the appellants' (Ashers Bakery Ltd and the McArthur family) freedom of expression rights under Article 10 of the European Convention. Specifically their argument was that they should not be compelled to express views contrary to their deeply held religious beliefs by decorating the cake in the manner requested by the respondent (Mr Lee). In order to discuss the freedom of expression issues posed by this dispute and the extent to which Article 10 contains a negative right to decline to speak it is necessary to set the appellants' defence in the overall context of the respondent's discrimination claim.¹¹

This claim was based on provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ('the 2006 Regulations') and the Fair Employment and Treatment (NI) Order 1998 ('the 1998 Order'). As noted above Judge Brownlie held that the respondent had been discriminated against on both of the pleaded grounds. The Court of Appeal, however, found unlawful discrimination only on the ground of the respondent's sexual orientation. This made it unnecessary to determine whether there had been discrimination on the ground of political opinion as well. Explained this way it would seem that the Court of Appeal began with discrimination due to sexual orientation and then passed on political opinion as it added nothing to the conclusion it had already reached. But as the discussion following will show a finding of discrimination due to sexual orientation required recourse to the complex theory of associative discrimination. Discrimination on the ground of political opinion would not have required any application of this doctrine and in this sense would have been easier to determine than discrimination due to sexual orientation. However the Court of Appeal may have wished to avoid grappling with the highly controversial question of what counts as 'political opinion' in the Northern Ireland legislation dealing with discrimination on the related grounds of religious belief and political opinion. Discrimination against a political opinion that gay marriage should be lawful is far removed from the religious beliefs and political opinions

¹¹ Literature on the religious freedom and anti-discrimination conflict includes Carl Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 *OJLS* 729; Ian Leigh, 'New Trends in Religious Liberty and the European Court of Human Rights' (2010) 12 *Ecc LJ* 266; Russell Sandberg, 'The Right to Discriminate' (2011) 13 *Ecc LJ* 157; Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' (2012) 14 *Ecc LJ* 256; Terence Etherton, 'Religion, the Rule of Law and Discrimination' (2014) 16 *Ecc LJ* 265; Ann Power-Forde, 'Freedom of Religion and 'Reasonable Accommodation' in the Case Law of the European Court of Human Rights' (2014) 5 *Ox J Law Religion* 575; Jack Friedman, Timothy Shah and Thomas Farr (eds), *Religious Freedom and Gay Rights: Emerging Conflicts in the United States and Europe* (2016, OUP, Oxford).

associated with the sectarian divisions in Northern Ireland society.¹² A finding of unlawful discrimination on the ground of political opinion would have extended the reach of this legislation well beyond the judges' comfort zone.

At the Court of Appeal stage of this litigation the Attorney General for Northern Ireland obtained leave to intervene in the proceedings, arguing that the anti-discrimination provisions relied on by the respondent were invalid as contrary to provisions in the Northern Ireland Act 1998¹³ and the Northern Ireland Constitution Act 1973¹⁴ which prohibited the enactment of legislation that discriminated against a person's religious belief or political opinion. The argument appears to have been that the McArthurs held both a religious belief and a political opinion that disagreed with gay marriage, so that making them civilly liable for refusing to express views with which they disagreed would discriminate against their religious belief and political opinion. This argument was rejected for reasons lucidly expressed by Lady Hale in the slightly different context of *Preddy v Bull*,¹⁵ as follows:-

"To permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally with persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation. We do not normally allow people to behave in a way which the law prohibits because they disagree with the law."

As this argument has little to do with the Article 10 issues posed by the Ashers case nothing more will be said about it.

Returning to discrimination on the ground of sexual orientation the relevant provisions of the 2006 Regulations were Regulations 3(1) and 5(1). Regulation 3(1) contains the relevant prohibited ground of discrimination ('sexual orientation') and the conventional definition of discrimination (treating a person less favourably on that ground than others would be treated). Regulation 5 provides that it is unlawful for a person providing goods, facilities or services to the public to discriminate against a person seeking those goods, facilities or services, either by refusing or omitting to provide them altogether or by providing them on different terms or in a different manner.

The appellants argued that their refusal to supply the respondent with a cake decorated the way he wanted it had nothing to do with his sexual orientation. They would have refused to provide that sort of cake for a heterosexual person who requested it. Many heterosexual persons believe in gay marriage because they think that this affords gay persons equality with heterosexuals. Others disagree, some because they consider homosexual acts to be sinful and others because they think that marriage can only be between a man and a woman. This is how the appellants could potentially have discriminated against the respondent because of

¹² On this question see *McKay v Northern Ireland Public Service Alliance* [1994] NI 103 (NICA), holding that a left wing/right wing political opinion came within the purview of the Fair Employment legislation. See Imelda McAuley, 'Rethinking the Scope of Discrimination: Political Opinion and Fair Employment Law in Northern Ireland' (1997) 48 *NILQ* 93.

¹³ Section 24, applicable here to the 2006 Regulations.

¹⁴ Section 17, applicable here to the 1998 Order.

¹⁵ [2013] UKSC 73, [2013] 1 WLR 3741, at [37].

his political opinion but for reasons stated above the Court of Appeal seems to have preferred to avoid that question. The appellants contended that they had nothing against Gareth Lee personally; their problem was with the ideal they were being asked to support.

Ashers is thus a different case from *Preddy v Bull*.¹⁶ In this case a Christian couple who ran a hotel in Cornwall declined to allow a homosexual couple in a civil partnership¹⁷ to share a double-bedded room because they reserved such rooms for heterosexual married couples. The Supreme Court unanimously held that this amounted to discrimination against the homosexual couple on the ground of their sexual orientation. Clearly the gay couple were refused use of the double-bedded room because they were gay. A heterosexual married couple who believed in gay marriage would still have been allowed to share the same room because they were heterosexual and married.

To reach the conclusion that the respondent had been discriminated against because of his sexuality the Court of Appeal had recourse to the doctrine of 'associative discrimination'. The benefit of the message or slogan on the cake could only accrue to gay people. As the Lord Chief Justice, Sir Declan Morgan, expressed it:-

"There was an exact correspondence between those of the particular sexual orientation and those in respect of whom the message supported the right to marry. This was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community."¹⁸

What this seems to say is that because of the respondent's close association with the gay community, and the way in which gay marriage would be of benefit to him, refusal to ice a cake with 'Support Gay Marriage' when the appellants would have been prepared to ice a cake with 'Support Heterosexual Marriage' amounted to direct discrimination against him on the ground of his sexuality.

With respect to the Lord Chief Justice this reasoning is difficult to follow. Where a certain kind of conduct, *e.g.* engaging in homosexual acts, is associated with a certain group of people, *i.e.* persons who experience same-sex attraction, the distinction between treating the behaviour with disfavour and treating those persons who primarily engage in it with disfavour, is meaningless. How that proposition maps on to the refusal to decorate a cake with a slogan supporting gay marriage, needs further and more lucid explanation than appears in the dictum above. 'Associative discrimination' is a sound doctrine where it is used to answer hair-splitting and unmeritorious arguments designed to excuse conduct that clearly transgresses the fundamental purpose of legislation. A request to decorate a cake with a

¹⁶ *Ibid.*

¹⁷ Prior to the Marriage (Same Sex Couples) Act 2013 this was the only solemnised legal relationship open to gay couples in the United Kingdom. It is provided for by the Civil Partnership Act 2004, which applies also in Northern Ireland, and remains in force today. The first civil partnership ceremony in the United Kingdom, between Grainne Close and Shannon Sickles, took place at Belfast City Hall! Civil partnerships are only available to same sex couples. This has been the subject of a so far unsuccessful legal challenge brought by a heterosexual couple in a committed relationship who do not wish to get married. See *Steinfeld and Keidan v Secretary of State for Education* [2017] EWCA Civ 81. An appeal to the Supreme Court is believed to have been lodged.

¹⁸ [2016] NICA 39, at [58].

tendentious message in the context of a divisive political debate within a community, is not an appropriate case for the application of this doctrine.

Applying the Human Rights Act 1998

As a defence to the argument that the appellants had discriminated against the respondent on the ground of his sexuality the appellants invoked Articles 9 and 10 of the European Convention and section 3 of the Human Rights Act 1998 ('the Human Rights Act'). Section 3 of the Human Rights Act requires the courts of the United Kingdom to read domestic legislation compatibly with applicable Convention provisions where possible. If this can be done by 'reading down' domestic legislation this is the approach to interpretation which the court should take. Where it is impossible to read legislation compatibly with the Convention even after reading it down the court's duty depends on whether the legislation is primary or subordinate. If primary legislation is found to be incompatible with an applicable Convention provision the court must then issue a declaration of incompatibility under section 4. If subordinate legislation (*i.e.* legislation made under legislative powers conferred by primary legislation) is incompatible with the Convention then it cannot be applied. Both pieces of discrimination legislation in issue in *Ashers* were subordinate legislation. But before the court is obliged to take either of these steps there must be some potential incompatibility between the domestic legislation and the Convention. It is Article 10 with which this paper is concerned but in order to understand the Article 10 arguments it is necessary first to explain how the Court of Appeal dealt with the Article 9 point.

Article 9 is in the following terms:-

- "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The appellants were able to bring themselves within Article 9.1 without difficulty.¹⁹ Their problem lay with Article 9.2's proviso that the *manifestation* of Article 9.1 rights was subject to limitations prescribed by law and necessary in a democratic society for the protection of the rights and freedoms of others, specifically members of the gay community. The appellants were not obliged to supply any kind of cake to any kind of person. They were not obliged to decorate cakes with "Support Gay Marriage" or any other kind of message. They were just not permitted to pick and choose between the kind of message relating to marriage they decorated cakes with or the kind of persons for whom they would provide the service.

¹⁹ There are no limits on what one may believe. See Katayoun Alidadi, *Religion, Equality and Employment in Europe – The Case for Reasonable Accommodation* (Hart, 2017, Oxford), p 41.

They could have made it clear that they were not prepared to decorate cakes with any kind of political or faith based message but the details of the customised cake service the appellants offered to customers did not suggest that there would be a problem with the message Gareth Lee wanted on the cake. The other difficulty the appellants faced with the 2006 Regulations was that Regulation 16 contained exceptions from the anti-discrimination provisions for faith based organisations, essentially those in existence wholly or mainly for religious purposes. The appellants ran a Christian business but it was not a business established to supply bakery products to Christian organisations.

The Court of Appeal's reasoning comes to this. The appellants had discriminated against the respondent within the terms of the 2006 Regulations, going by an ordinary and natural understanding of discrimination. The 2006 Regulations as a whole offered reasonable accommodation for Article 9 rights through Regulation 16 above. There was therefore no need to read the Regulations 'down' in order to ensure that the court complied with its section 3 Human Rights Act obligations. The flaw in this reasoning is as follows. Section 3 requires the court to read domestic legislation *compatibly* with Convention rights where possible. *Compatible* reading is not necessarily an exercise in reading legislation restrictively. If legislation given an ordinary and natural meaning is in conflict with a Convention right, it should be given a restrictive meaning if one can be found that eradicates the conflict. But if the conflict arises from an expansive reading of legislation the duty to read that legislation compatibly with Convention rights requires the court to think again about the appropriateness of the expansive reading. The Court of Appeal's application of 'associative discrimination' was an expansive reading of the 2006 Regulations and directly engaged the Court's duty under section 3 of the Human Rights Act to consider whether it should be applied in the face of the appellants' Convention rights. Regrettably the Court of Appeal failed to discharge this duty.

The Freedom of Expression Defence

At the outset it may be helpful to recall that the appellants were invoking Article 10 for the same reason as they invoked Article 9. Their argument was that section 3 of the Human Rights Act 1998 required the court to read the 2006 Regulations *compatibly* with Article 10 if that were possible and disapply them if that were not. The issue was whether the appellants' duty not to discriminate against the respondent in the services they supplied him with should be moderated in light of their Article 10 rights. Did the duty not to discriminate require the appellants to decorate the respondent's cake with a message they personally found an affront to their deeply held religious belief? This will require consideration of whether Article 10 contains a prohibition on coerced speech and whether complying with Gareth Lee's request would actually amount to coerced speech.

As appears below the Court of Appeal did not consider that Article 10 added anything significant to the appellants' defence under Article 9. In considering its reasoning here and the appellants' argument that they should not be coerced into expressing views inimical to their Christian faith, it has to be acknowledged that there is significant overlap between Articles 9 and 10. To manifest one's religion is to some extent to express it. The appellants

were relying on Article 9 to excuse them from meeting the respondent's order because the practice and observance of their faith did not permit them to do otherwise. A Christian's faith cannot just be manifested, practised or observed on Sunday. It must be reflected in daily living Monday through Saturday as well. A Christian who behaved on a weekday inconsistently with the faith observed through Sunday worship would be a hypocrite. It is not necessarily an answer to this that the belief is a personal one and not one reflective of fundamentals about which no adherent can disagree. A Christian life must be led consistently and views which one has expressed, either personally or in communion with others. The McArthur family, as members of the Presbyterian Church in Ireland, have a very clear position on homosexual behaviour, relationships and marriage. For them to have decorated this cake with the message "Support Gay Marriage" would have seemed to them to lie about an issue they regarded as important, even if other Christians might have taken a different view.

At this stage of the paper it will be assumed that the appellants did not have a defence to the respondent's claim under Article 9 of the Convention. It is some way from obvious that Article 9 did not require the 2006 Regulations to be read differently to ensure compatibility with Article 9 but for the sake of bringing out the appellants' Article 10 arguments this assumption will be made. What can Article 10 provide by way of defence that goes beyond what Article 9 offers? The overlap between Articles 9 and 10 is clear but each provision begins from a fundamentally different starting premise. Article 9 is about freedom of religion and this may require expression by believers. Article 10 is about freedom of expression and may include the expression of religious beliefs. If it were correct that an adherent to a religious creed could only rely on Article 9 for the protection of his or her freedom of religious expression then Article 10 would be robbed of all significance for religious believers. This cannot possibly be the intention behind Article 10. In fairness to the Court of Appeal it did not say that in a freedom of religion scenario Article 10 *never* adds anything to Article 9. It said that Article 10 added nothing to Article 9 *in this case* because the appellants did not *express* any opinion.

The appellants' Article 10 argument was essentially that the Convention protects not just the positive right to express opinions but also the negative right not to be coerced into expressing or endorsing an opinion one disagrees with. Freedom of speech means not just the freedom to speak but the freedom not to speak. At the outset it must be acknowledged that the appellants were not coerced into endorsing something they considered sinful as a condition of living in Northern Ireland. If they had not gone into business providing goods, facilities and services to the public there would have been no question of them being required to say or do anything that supported gay marriage. Any compulsion came from opening their business selling bakery products to the public. It can be argued that selling such products on a non-discriminatory basis between gays and straights is just a price they have to pay for running their business. It is only if Article 10 can be construed as prohibiting the imposition of such a condition on the basis that it is unjustified compulsion speech that the appellants would have a defence.

Does Article 10 prohibit coerced speech?

In assessing to what extent Article 10 contains a prohibition on coerced expression in this context it is worth considering to what extent the appellants may have had a right to *express*

the view that homosexuality is sinful. Recalling the passage quoted from *Palomo Sanchez and Others v Spain* above,²⁰ the demands of a pluralist society require a measure of protection for views that offend, shock or disturb. What might the Article 10 position be if the appellants had been asked to decorate a cake with the slogan “Homosexuality is Sinful” or “Homosexuality is an Abomination”? What, indeed, might the position be if they had taken it upon themselves to bake such a cake as a way of expressing their own sincerely held opinion on the subject? A consideration of Strasbourg jurisprudence suggests that the state might be able to justify laws restricting such speech consistently with Article 10.

The way in which the state might do this arises from the qualifications placed on the Article 10.1 right through Article 10.2. Restrictions on Article 10.1 rights that are “established by law” and “necessary in a democratic society” for the “protection of the reputation or rights of others”, can be imposed. The 2006 Regulations would not apply in the above scenarios because nobody would be discriminated against on the ground of their sexual orientation. The question would be whether Northern Ireland’s current law on ‘hate speech’ or other laws that may be enacted would likely pass muster under Article 10.2.²¹

In *Vejdeland and Others v Sweden*²² the applicants’ conviction for agitation against homosexuals was held to be a justifiable restriction on their Article 10.1 rights. They had distributed leaflets in a high school to which they did not belong and had no legal access, describing homosexuality as a “deviant sexual proclivity”, linking it to the spread of HIV and AIDS, and alleging that homosexual lobby groups tried to play down the problem with paedophilia. In *Otto-Preminger Institute v Austria*²³ the forfeiture of a film disparaging Roman Catholic doctrine was held justifiable as the population in the area of circulation of the film was 87% Roman Catholic and the attack on doctrine was malicious in tone. In *Wingrove v United Kingdom*²⁴ the blasphemy laws of England and Wales were considered acceptable as a protection of the rights and feelings of members of the Anglican Church.²⁵ In *IA v Turkey*²⁶ a criminal conviction and small fine for a novel vilifying Islam, the religion of the vast majority of the Turkish people, was also considered justifiable.

²⁰ *Supra* n. 5.

²¹ The nearest thing Northern Ireland has to a ‘hate speech’ law is article 9 of the Public Order (NI) Order 1987. This provision makes it an offence to use threatening, abusive or insulting words or behaviour with intent to stir up hatred or arouse fear, or where in the circumstances hatred is likely to be stirred up or hatred caused. Article 8 of the 1987 Order includes the sexual orientation of a group of people as one of the prohibited grounds on which hatred may be stirred up or fear caused. There is no equivalent in Northern Ireland to section 5 of the Public Order Act 1986 applicable in England and Wales. Under this provision an offence is committed if threatening or abusive words or behaviour likely to cause harassment, alarm or distress, are used. For a case applying section 5 see *Hammond v DPP* [2004] EWHC 69 (Admin) (DC); Ian Leigh, ‘Hatred, Sexual Orientation, Free Speech and Religious Liberty’ (2008) 10 *Ecc LJ* 337.

²² App 1813/07 (9 May 2012, Fifth Section).

²³ App 13470/87 (1995) 19 EHRR 34.

²⁴ App 17419/90 (1997) 24 EHRR 1.

²⁵ The fact that only the Established Church was protected by the blasphemy laws was considered insignificant in the context of Article 10. The common law crimes of blasphemy and blasphemous libel were abolished by the Criminal Justice and Immigration Act 2008, s.79.

²⁶ App 42571/98 (2007) 45 EHRR 30.

Sometimes the appeal to Article 10.2 has been unsuccessful. In *Giniewski v France*²⁷ a nominal damages award and the publication of a notice recording the applicant's conviction for publishing an article linking Roman Catholic theology to the Holocaust was held to violate the applicant's Article 10.1 rights. The article was a serious argument to the effect that the way Jews were presented in the New Testament, and the Church's teaching that the New Testament supplanted the Old, fostered a distrust and antipathy towards them. In *Klein v Slovakia*²⁸ a criminal conviction for writing an article critical of the stance taken by a Roman Catholic Archbishop on a certain film was held to violate Article 10.²⁹

In attempting to assess whether any limitations domestic law might impose on the McArthur family's wish to express their abhorrence of homosexuality could be justified under Article 10.2 it is important to recall the passage quoted from *Palomo Sanchez v Spain* above.³⁰ Article 10 rights apply also to opinions that offend, shock or disturb because that is what a democratic society dedicated to pluralism, tolerance and broadmindedness demands. Exceptions to those rights must be strictly construed and the need for them convincingly established. What is the need for or public interest justification for restricting people's right to express their abhorrence of homosexuality? Is it anything better than the furtherance of an equality agenda that effectively says equality is so important nobody shall be allowed to express disagreement with it? Provided the views expressed, and the manner of expressing them, comply with ordinary conventions for the expression of opinions, the fact that those opinions are sharply critical of the lifestyles of others, is no reason why they should be prohibited. To describe homosexuality as an abomination may be pushing it but to describe it as sinful is not. The latter is the expression of a belief that derives support from a most venerable of texts, the Bible.

There is not a voluminous amount of Strasbourg jurisprudence to support a right to be free from coerced expression. The case most directly in point is the decision of the Grand Chamber in *Gillberg v Sweden*.³¹ The applicant was a researcher employed by the University of Gothenberg. In carrying out a research project into Attention-Deficit Hyperactivity Disorder (ADHD) in children he gave an undertaking to parents that any data he accumulated would be kept confidential and not released without their consent. The information acquired by the applicant in the course of the research belonged to the university so if any person or body, apart from parents, had a right to allow access to the information it was the university. The applicant was required to give access to the information pursuant to legal procedures invoked by a sociologist and a paediatrician under Swedish freedom of information laws. He argued that Article 10 contained a negative right to freedom of expression which he could rely on to avoid having to disclose the requested material. The Grand Chamber noted that case law on this negative right was scarce³² but did not rule out the possibility that it could exist under Article 10.³³ However a proper consideration of this issue would have to wait for a case that

²⁷ App 64016/00 (2007) 45 EHRR 23.

²⁸ App 72208/01 (2010) 50 EHRR 15.

²⁹ The language was quite strong and personal and the decision of the European Court was by a four to three majority.

³⁰ *Supra* n. 5.

³¹ App 41723/06 (3 April 2012).

³² *Ibid*, para 85.

³³ *Ibid*, para 86.

directly raised it.³⁴ The applicant had no such right in the circumstances of this case as the information belonged to his employer, not himself, and the employer was minded to comply with the order of the relevant court.³⁵ The applicant had invoked the journalist's right to protection of sources but the Grand Chamber observed here that this was ancillary to the journalist's positive right to freedom of expression.³⁶ Finally the applicant's allusion to legal professional privilege was inappropriate because it was concerned with Article 8 rights,³⁷ and the doctor's duty of confidence towards patients did not apply here as none of the research participants had mandated the applicant to act as their doctor.³⁸

It should not be a surprise, however, that there is a less than voluminous amount of Strasbourg case law on coerced speech. It is not likely to be an issue that would arise very often. Article 10.1 expressly states that the right to freedom of expression includes "freedom to hold opinions". A freedom to hold an opinion is rather meaningless if the state can compel one to express the very antithesis of that opinion by one's words or actions routinely or even on a particular occasion. Other Strasbourg and some North American free speech jurisprudence offers support for that view.

In *Goodwin v United Kingdom*³⁹ the Grand Chamber held by an 11-7 majority that a court order requiring a journalist to reveal his sources for a business story violated Article 10. The UK government's Article 10.2 defence satisfied the 'prescribed by law' and 'pursuit of a legitimate aim' criteria but the disclosure order was not 'necessary in a democratic society'. *Gillberg* did explain the journalist's right to keep sources secret as an aspect of the positive right to freedom of expression but some weight should still be afforded to the Commission's view in *Goodwin* that "[t]here are circumstances in which a 'negative right' is to be implied in Article 10 not to be compelled to give information or to state an opinion (see e.g. No. 9228/80, 16/12/82, DR 30, p 132 and 12090/86, 4/12/89 unpublished)."⁴⁰

In *Glaserapp v Germany*⁴¹ the applicant had been required to sign a declaration supporting the free democratic order of the Federal Republic as a condition of appointment as a probationary grammar school teacher. She was subsequently dismissed when she refused to repudiate views she expressed in the newspaper of the German Communist Party, which believes *inter alia* in a one party state. By a 16-1 majority the European Court of Human Rights, overturning the Commission, held that Article 10 had not been violated. The judgment contains nothing specifically denying the existence of a negative right to freedom of expression but in not justifying the requirement for the applicant to repudiate allegiance to the Communist Party in terms of Article 10.2 (as Judge Cremona did) it could be understood as casting doubt on the existence of this negative right. The Court's judgment attempts to explain the decision in terms of the applicant's violation of the terms of her admission to employment in the German civil service. She had signed the declaration above and

³⁴ *Ibid.*

³⁵ *Ibid*, para 92.

³⁶ *Ibid*, para 95.

³⁷ *Ibid*, para 96.

³⁸ *Ibid.*

³⁹ App 17488/90 (27 March 1996).

⁴⁰ Report of the Commission, 1/3/94, at paragraph 48 (emphasis added).

⁴¹ App 9228/80, (1987) 9 EHRR 25.

afterwards breached its conditions.⁴² The Commission's 9-8 decision that Article 10 had been infringed depends much more on Article 10.2 and thus offers implicit support for negative freedom of expression.⁴³

In *Sorensen v Denmark*,⁴⁴ a case about Article 11 (freedom of association) in the context of trade union closed shops, the Court had this to say about negative freedoms in Articles 9-11 generally:-

"Furthermore, regard must also be had in this context to the fact that the protection of personal opinions guaranteed by Arts 9 and 10 is one of the purposes of the guarantee of freedom of association, and that such protection can only be effectively secured through the guarantee of both a positive *and a negative right to* freedom of association. In this connection the notion of personal autonomy is an important principle underlying the interpretation of the Convention guarantees. This notion must therefore be seen as an essential corollary of the individual's freedom of choice implicit in Art. 11 and confirmation of the negative aspect of that provision."⁴⁵

The Court recognised that sometimes the freedom not to join a trade union included within the right to freedom of association can be restricted. However the dictum above strongly supports the fundamentally common sense notion that all the freedoms guaranteed by Articles 9-11 of the Convention are matters of personal choice. In the context of personal opinions that must mean having a right to choose one's opinions and a right to choose whether or not to express them.

Whatever the equivocations of the European Court of Human Rights on the subject of coerced expression there has been none on the part of United States' courts in considering the right to freedom of expression under the First Amendment to the United States' Constitution. In *Wooley v Maynard*⁴⁶ the Supreme Court held unconstitutional a New Hampshire statutory provision imposing criminal penalties on motorists who failed to display the state motto 'Live Free or Die' on their licence plates. To force an individual, on pain of criminal sanction, to be an instrument for advocating public adherence to an ideological point of view he finds unacceptable "invades the sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control."⁴⁷ Burger CJ's opinion for the Court stressed:-

"We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. ... A system which secures a right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from

⁴² *Ibid*, at paragraph 52.

⁴³ (1984) 6 EHRR CD499.

⁴⁴ (2008) 46 EHRR 29.

⁴⁵ *Ibid*, at paragraph 54.

⁴⁶ 430 US 705 (1977).

⁴⁷ *Ibid*, at 715, citing *Board of Education v Barnette*, 319 US 624, at 636.

speaking are complementary components of the broader concept of “individual freedom of mind.”⁴⁸

Rehnquist J’s dissent focused on whether New Hampshire’s statute actually did compel speech.⁴⁹ It did not contest the proposition that inherent within the First Amendment’s guarantee of the right to express views was also the right not to express. Further support for the theory that the expression of views cannot be compelled comes from *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston Inc*,⁵⁰ and *Boy Scouts of America v Dale*.⁵¹

A significant case at state court level is *Hands On Originals Inc v Lexington-Fayette Urban County Human Rights Commission*.⁵² Hands On Originals (HOO) is a small printing business in Kentucky which prints promotional materials such as shirts, hats, blankets, cups, bottles and mugs. Its managing owner is a practising Christian and the firm’s website states as follows with respect to the kind of work it will do:-

“Hands On Originals both employs and conducts business with people of all genders, races, religions, sexual preferences, and national origins. However, due to the promotional nature of our products, it is the prerogative of Hands On Originals to refuse any order that would endorse positions that conflict with the convictions of the ownership.”

HOO refused to meet an order for promotional material (t-shirts) placed by an LGBT organisation. The respondent Commission made a finding of discrimination against HOO which the Circuit Court set aside. Judge Ishmael found that there was no evidence in the record that HOO had refused to print the t-shirts because of the sexual orientation of the LGBT group or its members. It refused to do the work because of the message that it would be promoting. On the authority of the Supreme Court decisions above it this would violate the First Amendment right of its owner to decline to endorse beliefs it disagreed with.⁵³

The United States’ decisions are all very clear to the effect that there is an implicit right in the First Amendment not to express views with which one disagrees. There is no significance in the different wording of Article 10 of the European Convention and the First Amendment to the US Constitution on this question. The right not to express an opinion is a necessary incident of the right to express it. Someone who has a right to say something has a right not

⁴⁸ *Ibid*, at 714.

⁴⁹ *Ibid*, at 721-722.

⁵⁰ 515 US 557 (1995). An unincorporated private body organising the joint St Patrick’s Day-Evacuation Day Parade could not be compelled to allow an organisation dedicated to promoting the rights of LGBT persons to participate. This violated their First Amendment right of non-associative expression.

⁵¹ 530 US 640 (2000). The Boy Scouts’ First Amendment right to reject a homosexual lifestyle as incompatible with Scouts’ values permitted it to dismiss a scout master who was a gay rights’ activist. To prohibit the Boy Scouts from doing this would be to force it to propound views with which it disagreed.

⁵² Fayette Circuit Court Civil Branch Third Division No. 14-CI-04474 (27 April 2015). An appeal was heard by the Kentucky Court of Appeals in December 2016 but as yet no decision has been issued.

⁵³ On 12 May 2017 the Kentucky Court of Appeals, by a 2-1 majority, dismissed an appeal in this case. See No. 2015-CA-000745-MR. The essential ground of the decision was that HOO had not discriminated against the LGBT organisation.

to say it. Anyone who has no right to decline to express an opinion can have no *right* to hold or express that opinion in the first place.

Before turning to the question of what actually constitutes coerced expression reference will now be made to a decision from Canada which bears similarities to *Ashers* and to the Kentucky decision above. In *Brockie v Ontario Human Rights Commission*⁵⁴ the appellant was the president and directing mind of a commercial printing company based in Toronto. Like the McArthurs he was a practising Christian and held a sincere religious belief that homosexual conduct was sinful. He declined to service an order from the Canadian and Lesbian Gay Archives ('Archives') for a print run of letterheads, envelopes and business cards, all of which noted the fact that this corporation represented the interests of gays and lesbians. The Court allowed an appeal against the decision of the Ontario Human Rights Commission that the appellant had unlawfully discriminated against Archives by refusing to fulfil this order. By requiring the appellant to print material of this nature his right to freedom of religion under section 2 of the Canadian Charter of Rights and Freedoms had been infringed.

The Northern Ireland Court of Appeal regarded *Brockie* as of limited assistance for four reasons.⁵⁵ First, there was no statutory background comparable to the 2006 Regulations where the legislature had struck a balance between competing rights. In light of the exceptions for religious organisations in the 2006 Regulations there is something in this point so far as Article 9 is concerned. But these exemptions have no relevance to freedom of expression, specifically whether someone can be compelled to endorse an opinion they disagree with. Secondly, Archives were required to do much more by way of proselytising the gay and lesbian lifestyle than *Ashers* bakery would have been required. This is true but one must both accept the Lord Chief Justice's argument below that the McArthurs were not required to endorse gay marriage, and ignore the context of the ongoing debate in Northern Ireland about that subject, to be fully convinced by it. Thirdly, there was nothing in *Ashers* that would have ridiculed the deeply held religious beliefs of the McArthur family. This is unconvincing because it shows little respect for the McArthur family's right to think that decorating the cake with "Support Gay Marriage" would do precisely that. Fourthly, consideration had to be given to the breadth of the McArthurs' offer, in other words the absence of any indication on their website that there could be a problem with the message the respondent wanted as a decoration. The significance of this as a point of distinction from *Brockie* is not clear as the Ontario Superior Court of Justice did not go into the breadth of the appellant's 'offer' to customers.

What amounts to coerced speech?

Now the point is reached at which it is necessary to address the question of whether decorating the respondent's cake with 'Support Gay Marriage' would actually amount to an endorsement of that message and thus involve a potential invasion of the appellants' Article 10 right of negative expression. So as there can be no accusations of distortion or selectivity the full passage of the Court of Appeal's judgment on this question is set out:-

⁵⁴ [2002] 22 DLR (4th) 174.

⁵⁵ [2016] NICA 39, at [70].

“In this case the appellants contended that there was an additional factor in that this was a case of forced speech and engaged the appellants’ rights under art. 10 ECHR. It was not suggested that there was any approbation of the message on the face of the cake and the trial judge concluded that what the respondent wanted did not require them to promote or support gay marriage. There is no challenge to that conclusion directly in the questions before us and in any event we consider that the conclusion was undoubtedly correct. The fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either.”⁵⁶

This was how the Northern Ireland Court of Appeal avoided the problem of apparently denying the appellants’ right to refuse to endorse a cause they strongly disagreed with. The reasoning in the above paragraph is shallow, superficial and simply unacceptable. It says that there was no challenge to the trial judge’s conclusion that there was no approbation of the message to be placed on the cake! This is simply a distortion of the appellants’ arguments. They brought a case stated to the Court of Appeal of Northern Ireland asking whether as a matter of law the appellants discriminated against the respondent because they would not decorate his cake with the message he wanted. To answer that question the Court of Appeal was required to consider whether an act of discrimination was committed by refusing to place the respondent’s requested message on the cake. This required the Court of Appeal to consider the appellant’s Article 10 rights. Did they extend to being excused from having to express an opinion they disagreed with? Was icing a cake with the slogan “Support Gay Marriage” the expression of support for gay marriage? If so, did this mean that the meaning given by the Court to ‘discrimination’ under the 2006 Regulations had to be adjusted to ensure that the appellants were not deprived of their Article 10 rights? Dismissing these questions with the overtly glib remark that no more support would be offered to gay marriage than to the football team whose name and colours were iced on a cake, or to the occult where the image of a Halloween witch was similarly iced, was disrespectful to the losing litigant.⁵⁷

It will be recalled that in *Wooley v Maynard* Rehnquist J dissented on the ground that displaying the state motto on a licence plate did not involve expressing support for it.⁵⁸ This was just a condition that had to be satisfied in order to acquire the right to drive a car in New Hampshire. If a citizen wanted to use United States coin or currency (s)he had to accept the mottoes ‘In God We Trust’ and ‘E Pluribus Unum’. In *Glaserapp v Germany*⁵⁹ the European Court of Human rights similarly regarded the applicant’s consistent adherence to her signed declaration of support for democratic values as a condition of holding down employment in the civil service. Whatever the persuasiveness of the reasoning in these contexts what one has to do to acquire public benefits and employment which one cannot easily do without is a world away from a bakery owner selling a cake to a customer.

⁵⁶ *Ibid*, at [67].

⁵⁷ Sir Robert Megarry is reputed to have told students that the losing litigant was the most important person in court. The judge should understand the importance of making it clear why (s)he had lost and the emotional impact of the decision. See Nicholas Merriman, Obituary of Sir Robert Megarry, *The Independent* 25 October 2006.

⁵⁸ *Supra* n. 46.

⁵⁹ *Supra* ns 41-43 and text.

Three other American authorities are instructive on the question of associative speech. First, *Pruneyard Shopping Centre v Robins*⁶⁰ was a case in which the owners of a very large shopping centre⁶¹ were held to have suffered no infringement of their First Amendment right not to be associated with the views of a group of high school students who occupied a corner of the centre's central courtyard on a Saturday afternoon to protest about a United Nations resolution against 'Zionism'. Nobody, it was held, would associate the views of the students with the owners of the shopping centre on those facts. Second, there is the decision of the New Mexico Supreme Court in *Elane Photography LLC v Willock*.⁶² Here *Pruneyard* was applied to reach the conclusion that a small commercial photography business that refused to photograph the commitment ceremony of two gay women because of the owners' Christian beliefs, had no First Amendment defence to a claim for violation of anti-discrimination provisions in the New Mexico Human Rights Act 1978. People would not think that the owners of this business were promoting gay marriage, just that they were complying with the law. Indeed the New Mexico Supreme Court advised that business proprietors who did not want to be seen as endorsing causes they disapproved of could place a message on their business' website stating that they were only complying with the law and did not support those causes. With respect to the New Mexico Supreme Court this decision may not be entirely consistent with *Pruneyard*. Powell J's concurring opinion drew attention to the immense size of the shopping centre to stress that it was in that context that other persons would not see a connection between the views of the demonstrating students and the owners of the shopping centre.

Third, there is America's very own 'Gay Cake' case, *Craig v Masterpiece Cakeshop Inc.*⁶³ In this case two gay men visited a bakery in Lakewood, Colorado, and requested that a cake be designed and created to celebrate their same-sex wedding. The wedding was to be in Massachusetts because at that time (2012) Colorado did not recognise same-sex marriage and the United States Supreme Court had not rendered its decision in *Obergefell v Hodges*⁶⁴ requiring all states to do so. The proprietor refused to provide the cake because of his Christian belief that gay marriage was morally wrong. The Colorado Court of Appeals upheld a finding of unlawful discrimination and rejected the bakery owner's defence of coerced expression contrary to the First Amendment. The Court of Appeals held that this was not a case of 'expressive conduct'. Like *Elane Photography* nobody would associate the provision of a wedding cake for a gay couple with support for gay marriage, and it was also open to the proprietor of the business to place a message on the business website that support for certain causes was not being provided by designing and selling a cake. The case was distinguished from *Hurley*⁶⁵ on the ground that a parade was intrinsically expressive. Significantly, however, the Court of Appeals acknowledged that there had been no discussion about any message to be placed on the cake and that this might possibly raise a First Amendment issue.⁶⁶ On 26th June 2017 the United States Supreme Court granted certiorari in this case.

⁶⁰ 447 US 74 (1980).

⁶¹ The 'mall' extended over 21 acres, 5 of these were devoted to parking and the remainder to walkways, plazas, sidewalks, and buildings. There were more than 65 specialty shops, 10 restaurants, and a movie theatre.

⁶² No. 33,687 (22 August 2013).

⁶³ 370 P.3d 272 (2015).

⁶⁴ 135 S.Ct 2584 (2015).

⁶⁵ *Supra* n. 50.

⁶⁶ *Supra* n. 63, at para 71.

In the New Mexico and Colorado cases the superior courts of those states provided notably more rigorous consideration of the question whether there had been coerced expression than did the Northern Ireland Court of Appeal in *Ashers*. Assuming for the sake of argument that the courts' reasoning is persuasive there are several reasons to doubt whether the same outcome should properly be reached in *Ashers*. First, a finding that First Amendment rights had been infringed in the American cases would necessarily have been more drastic. The state legislation would have been unconstitutional whereas this consequence only follows in *Ashers* if the 2006 Regulations cannot be read compatibly with the McArthur family's Convention rights. Secondly the American cases did not go beyond the straightforward refusal to provide services to gay couples. There was no message to be placed on a cake or on photographs supporting gay marriage or LGBT rights. Thirdly, and most significantly, there was no evidence recited in the opinions of the American courts of any ongoing debate in the local community, or any public event occurring in the near future, to which the message on the *Ashers* cake was to contribute.

Let us conclude this section by considering Sir Declan Morgan's football team analogy in its own terms. Imagine a Liverpool football club supporter ordering a cake with "Liverpool are Magic" iced on the top from a baker who supports Manchester United. The baker may well remark that this is a very dubious message (s)he is being asked to decorate the cake with. There would probably follow some good natured banter between the customer and the baker about whose team was doing better at that time, past matches between the teams, and who was going to win the next encounter between them. But the baker would produce the cake to the customer's specifications and deliver it with a remark something like "it took a lot out of me." This sort of scenario is completely different from a Christian baker who disagrees with gay marriage being asked to decorate a cake with a message supporting it. The latter is an extremely divisive subject of political controversy. Football team banter belongs in the pub and Halloween witches to children's parties.

Conclusion

In *Ashers* the senior judiciary of Northern Ireland had an excellent opportunity to show that they were capable jurists. But they fluffed their lines spectacularly. The judgment is mostly a narrative of legislative provisions, other legal authorities, and the submissions of the parties. It contains little in the way of legal analysis and bears all the hallmarks of result oriented decision making. First, discrimination on the ground of political opinion was by-passed to avoid broadening the Fair Employment legislation even further beyond an antidote to Northern Ireland's sectarian divisions. Secondly, discrimination on the ground of sexual orientation was found via a highly puzzling application of the doctrine of associative discrimination. The obligation to read legislation compatibly with European Convention guarantees was satisfied by showing how there was no need to read the 2006 Regulations 'down' while ignoring consideration of how section 3 of the Human Rights Act applied in the context of expansive reading. The essential question in the case, whether the appellants could be compelled to endorse gay marriage despite their strong religious objections to it, was summarily dismissed as one that did not even arise on the facts.

The introduction to this paper indicated that consideration would be given to the question of whether there is a right not to express a view on a given subject in Article 10 of the European Convention. The answer to that question is that there is a negative right to freedom of expression in Article 10. There has to be and there would be in any constitutional provision or Charter of Rights recognising a right to freedom of expression. If one is compelled to say the contrary to what one believes then one does not have much of a right. Whether there is compelled expression is another question but the view expressed here is that in the context of a small retail business that is asked to bake and ice a cake with a message that runs contrary to a deeply held belief of the owners of the business, in the context of a raging political controversy in the community where the cake is to be baked, this constitutes an infringement of the business owners' rights under Article 10 of the European Convention on Human Rights. As such the Northern Ireland Court of Appeal should have considered whether this required it to give a meaning to the Equality Act (Sexual Orientation) Regulations (NI) 2006 that rendered a verdict to the effect that no unlawful discrimination occurred in this case. Necessary to this conclusion is a splitting of the message on the cake from the sale of the cake itself. If this case is seen as simply one where a customer asked for a cake with a certain message endorsed on it, and did not receive the requested service, it looks like this is a case of unlawful discrimination. But this is too much of a zero sum approach. As pointed out in the introduction to this paper one person's right often conflicts with another's. When that is so there is a need to balance rights against each other. The answer does not have to be that one party wins all and the other loses all. A reasonable accommodation in *Ashers* would have been that Gareth Lee can have his cake but someone else has to place the message on it.

What will happen with the *Ashers* case? The McArthurs petitioned the United Kingdom Supreme Court for leave to appeal. The Equality Commission and Gareth Lee filed written arguments opposing this. It does not seem that there was much dispute that a point of law of general public importance is in issue. The issue with respect to leave seems to have been that the case stated procedure does not in terms provide for any further appeal beyond the Northern Ireland Court of Appeal. Had the McArthurs invoked the procedure under article 60 of the County Court (NI) Order 1980 they would have been granted a complete re-hearing before the High Court on all issues. From there an appeal to the Court of Appeal for Northern Ireland could have been taken on a point of law and then the Supreme Court could have been asked to grant leave for a final appeal if there were a point of law of general public importance. The case stated procedure was presumably used because the issues in the case were legal rather than factual and there was a desire to avoid the unnecessary costs that would have been involved if an appeal to the Court of Appeal had been a second appeal. Leave to appeal to the Supreme Court has been granted but there is, as yet, no clarity as to the precise questions to be argued. It is likely that the appeal will be heard sometime early in 2018 with judgment being delivered sometime after that. An application could be made to the European Court of Human Rights after the Supreme Court hands down its determination. Indeed there could have been such an application if the Supreme Court had refused leave.⁶⁷ The issue in Strasbourg would be different. It would be a determination of whether Northern Ireland's anti-discrimination law is compatible with the United Kingdom's obligations under the Convention, not a final appeal in the *Ashers* case as such. To what extent the United

⁶⁷ In none of the cases heard together by the European Court of Human Rights in *Eweida v UK*, *supra* n. 4, did the United Kingdom Supreme Court grant leave to appeal.

Kingdom Supreme Court examines the free speech issues beyond the cursory treatment afforded by the Northern Ireland Court of Appeal remains to be seen. It is to be hoped that it will see this case much more through this lens. With certiorari granted in *Craig v Masterpiece Cakeshop Inc* there promises to be some very interesting trans-Atlantic perspectives on discrimination, freedom of religion, and free speech to be digested in the near future.